

**Responsiveness Summary to Comments Received on EPA's Public Notice Dated  
July 16, 2003, Regarding Adding back Lakes to Iowa's 2002  
CWA Section 303(d) List**

EPA received comments from 10 commenters in response to our request for input from the Public on EPA's decision to restore 20 lakes to the Iowa 2002 Clean Water Act (CWA) Section 303(d) list. Those commenters include:

1. Winneshiek County Soil and Water Conservation District (Lake Meyers)
2. Midwest Environmental Justice Advocates (listing/delisting, consent decree)
3. James H. Giese (20 waterbodies added back)
4. Iowa Department of Natural Resources (listing issues, 20 water bodies added back,
5. Agribusiness Association of Iowa (20 waterbodies added back)
6. Iowa Environmental Council (listing/delisting, 20 waterbodies added back)
7. Iowa Farm Bureau Federation (20 waterbodies added back, authority of CWA)
8. Iowa Poultry Association (20 waterbodies added back, authority of CWA)
9. Sandra H. Greiner (20 waterbodies added back)
10. Sierra Club (listing/delisting, consent decree)

Because similar comments were made by multiple commenters, the responsiveness summary groups the comments and provides summary responses.

Several comments were related to issues not covered by EPA's public notice. These comments related to general topics such as insufficient data quantity, Iowa's credible data law or nitrate listing criteria applied to sources of water. The Agency invited comments solely on its decision to add back 20 lakes to the Iowa 2002 303(d) list. EPA's decision to partially approve Iowa's list was not subject to public comments. EPA will, however, forward such comments to Iowa for their use in developing the State's 2004 303(d) list.

Comments related to the *SAILORS* consent decree will be addressed through requirements of the consent decree and ongoing discussions with the plaintiffs.

**1. The Iowa Farm Bureau and Iowa Poultry Association commented that it was their belief that the impaired waters list and TMDL program brings non-point sources, including agriculture, into a regulatory framework, which is beyond the authority of the CWA.**

Response: EPA's long-standing interpretation is that Section 303(d) of the CWA applies to waters impacted by both point and nonpoint sources. This interpretation was upheld by the Ninth Circuit Court of Appeals in an opinion issued on May 31, 2002. In *Pronsolino v. Nastri*, the appellate court ruled that Section 303(d) authorizes EPA and the States to list and establish total maximum daily loads (TMDLs) for waters impaired only by nonpoint sources of pollution. The Ninth Circuit found support for its conclusion in the language and structure of Section

303(d), as well as the overall approach of the CWA. On June 16, 2003, the U.S. Supreme Court declined to review the Ninth Circuit decision. As a result, that ruling stands.

**2. Some comments indicated that even though it was believed that EPA approved Iowa's listing methodology, the methodology was inconsistently applied by the Agency when EPA approved Iowa's addition of 28 waterbodies to Iowa's list, but disapproved the removal of 20 lakes. Additionally, IDNR commented that they do not feel that EPA adequately explained the basis for adding 20 lakes back to Iowa's 2002 303(d) list.**

Response: Neither the CWA nor its implementing regulations require EPA to approve a State's 303(d) listing methodology. On January 3, and June 21, 2002 EPA provided comments on the State's listing methodology and reminded Iowa that EPA neither approves nor disapproves their listing methodology. The State's final amended methodology was provided to EPA on January 21, 2003, subsequent to Iowa's December 19, 2002, submission of their 2002 303(d) list.

The approach Iowa used in developing their 2002 303(d) list resulted in adding 28 lakes and removing 20 "**lakes**" (the removal of 71 other waters from Iowa's list was approved by EPA) from its EPA approved 1998 303(d) list. EPA agrees with Iowa's decision to add 28 lakes to its 303(d) list. Since IDNR had only two years of the three year data set called for in their methodology, it chose to use relatively high thresholds to account for the lack of sufficient data for purposes of determining impairment for the 28 lakes. EPA agrees that the use of these high thresholds provides overwhelming evidence of water quality impairment and supports the listing of these lakes. EPA also agrees with IDNR that for such waters it is unlikely that the third year of data will change the State's conclusion regarding impairment. However, since the use of these high thresholds to delist waterbodies could result in the removal of waterbodies which could actually be impaired, EPA does not agree with using the high thresholds as a basis for removing lakes from the EPA approved 1998 list without first considering the third year of data. During the public comment period concerning EPA's decision to add back these waterbodies to the State's list, EPA received no new data or information, other than the clarification that Little Clear Lake is not part of the Iowa State University lake study, to support the removal of the lakes originally listed on Iowa's 1998 list. Therefore, EPA believes the decision to remove the lakes is premature. Also, refer to EPA's response to question #3 below.

**3. IDNR believes that the approach used to identify lake impairments for the 2002 303(d) list in the absence of actual numeric criteria for nutrients and nutrient related turbidity is scientifically defensible. Further, IDNR stated that they developed numeric translators for state narrative Water Quality Standards (WQS) protecting against nuisance aquatic life and aesthetically objectionable conditions. Iowa does not believe that the state's numeric or narrative criteria are directly relevant to levels of phosphorus in the water column of a lake. Therefore, IDNR states that EPA's expectation that Iowa will develop numeric translators or thresholds (including phosphorus) which can be used for purposes of analyzing all the lake study data and determining impairment is actually adoption of a numeric water quality standard for phosphorus which IDNR believes is contrary to the legal and procedural requirements of both Iowa law and the CWA.**

Response: EPA believes Iowa's approach for adding impaired lakes to their 2002 303(d) list is reasonable and approved the addition of 28 lakes. However, to ensure a complete 303(d) list Iowa must consider all existing and readily available data and information. While reviewing the lake study data provided to EPA, subsequent to the submission of the 2002 303(d) list, EPA noted that along with chlorophyll-a and Secchi depth, phosphorus data were also collected and Trophic State Index (TSI) values (refer to EPA's July decision letter) developed. Some of the phosphorus TSI values appear elevated. EPA believes Iowa should clearly demonstrate that the levels of phosphorus are not impairing designated uses of the lakes. As such, as described in EPA's July letter, EPA expects IDNR to address this issue in their 2004 303(d) list.

When considering information for listing purposes EPA's decisions are based on Federal statute and regulations. As such the question of whether or not an action is consistent with the requirements of State law, are outside EPA's review and not considered in a federal action. EPA's position on this subject was previously stated in our letter of September 25, 2002.

**4. IDNR requested EPA not add back Little Clear Lake because it was not part of the lake study. The IEC recommended retaining Little Clear Lake on the 303(d) list based on the information included in Iowa's CWA Section 305(b) report indicating that the aquatic life uses are impaired by high levels of nutrients in the lake.**

Response: EPA incorrectly identified Little Clear Lake as being part of the ongoing ISU lake study and will remove it from the list of waterbodies being added back to the Iowa 303(d) list.

Not all waterbody information included in a state's 305(b) report is reflective of actual waterbody monitoring data or waterbody specific studies. Therefore, although appropriate to be included in the 305(b) report and considered for section 303(d) assessment purposes, the state is not required to include these waterbodies on their 303(d) list.

**5. The Winneshiek County Soil and Water Conservation District commented that Lake Meyers supports a healthy fish population and should not be included on the 303(d) list.**

Response:

Lake Meyers is one of the 20 lakes restored to Iowa's 2002 list by EPA. Refer to EPA's responses to comments 2 and 3.